Supreme Court, U.S.
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No. 92-1176

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH ISGRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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Petitioner contends that the court of appeals erred in reversing the order of the district court dismissing an indictment on the ground of prosecutorial misconduct.

1. On November 30, 1989, petitioner was indicted on 51 counts by a grand jury sitting in the Central District of California. He was charged with a variety of offenses arising from a scheme to promote musical artists illegally through "payola," *i.e.*, payments to officials at local radio stations, with funds derived from narcotics trafficking. Pet. App. 5a, 21a.

Dennis DiRicco, an alleged unindicted co-conspirator who was an attorney and accountant, testified before the grand jury and was scheduled to testify as a government witness at trial. In 1988, DiRicco was tried in the United States District Court for the Northern District of California on charges involving money laundering and narcotics. DiRicco testified at his trial, and a transcript of his testimony was prepared at that time. Pet. App. 6a.

The prosecutor informed the grand jury that DiRicco had been convicted, but he did not reveal that DiRicco had testified at his trial. The prosecutor also did not include a copy of the trial transcript or acknowledge that the transcript existed when he responded to petitioner's pretrial request for exculpatory material under *Brady* v. *Maryland*, 373 U.S. 83 (1963). On August 28, 1990, during petitioner's trial, petitioner's attorney advised the court that he had obtained a copy of the transcript of DiRicco's testimony, and he asserted that the transcript was additional *Brady* material that should have been provided to him before trial. Petitioner's counsel requested sanctions against the government for its failure to produce the transcript before trial. Pet. App. 7a-8a.

On September 4, 1990, the district court dismissed the indictment with prejudice. The court concluded that the prosecutor had misled the grand jury by not presenting DiRicco's testimony, that he had lied to the court about the existence of *Brady* material, and that he had intended to keep the transcript from petitioner during the trial. The court ruled that the prosecutor had usurped the function of the grand jury

and had violated petitioner's constitutional right to a fair consideration of the case by the grand jury. Alternatively, the court found that it could exercise its inherent supervisory power to dismiss the indictment to ensure the fundamental fairness of judicial proceedings. Pet. App. 19a-32a.

2. The court of appeals reversed. Pet. App. 1a-18a. The court found that the prosecutor's failure to present DiRicco's trial transcript to the grand jury was not a usurpation of the grand jury's functions, because there is no duty to present exculpatory evidence to the grand jury. The court also ruled that the district court could not use its supervisory powers to dismiss the indictment in the absence of identifiable prejudice to petitioner.

3. Petitioner contends (Pet. 4-7) that the court of appeals improperly limited the district court's authority to dismiss indictments in the exercise of its supervisory power and that the court of appeals effectively ruled that post-indictment prosecutorial misconduct can never be the basis for dismissal of an indictment.

Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of

certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WILLIAM C. BRYSON
Acting Solicitor General

FEBRUARY 1993

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.